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JUL 1 - 2014

Federal Communications Commission
Office of the Secretary

June 13, 2014

The Honorable Tom Wheeler
Chairman
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

RE: WT Docket No. 13-238; WC Docket No. 11-59; RM-11688 (terminated)

SUBJ: California Local Governments Response to Letter from Congressmen Fred Upton and Greg Walden to Commission Chairman Tom Wheeler

Dear Chairman Wheeler:

This letter from the League of California Cities, the California State Association of Counties, and the States of California and Nevada Chapter of National Association of Telecommunications Officers and Advisors (collectively, the "California Local Governments") responds and objects to the comments in a letter dated May 29, 2014, sent to Commission Chairman Tom Wheeler from Congress members Mr. Fred Upton and Mr. Greg Walden (the "Upton-Walden Letter")¹ in connection with the current Notice of Proposed Rulemaking to interpret Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012.²

The individual opinions in the Upton-Walden Letter (1) improperly attempt to impose their interpretation of Section 6409(a) as the intent of Congress as a whole, and (2) they urge the Commission to adopt broadly preemptive rules, even though the statute does not authorize the Commission to adopt such rules.

First, the Upton-Walden Letter attempts to create an after-the-fact legislative history for Section 6409(a).³ No contemporaneous legislative history exists for this statute.⁴ There was no oral debate nor written comments offered during the pendency of the bill that resulted in Section 6409(a). No one—not even Congress members Upton or Walden—ever made the statements contained in the Upton-Walden Letter to Congress before the vote.

¹ See Letter from Rep. Fred Upton and Rep. Greg Walden to Chairman Tom Wheeler, FCC (May 29, 2014) (attached to this letter as Attachment 1).

² See In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, Notice of Proposed Rulemaking, 2013 WL 5405395 (F.C.C.), *1 (adopted Sep. 26, 2013).

³ See Upton-Walden Letter, *supra* note 1, at 1.

⁴ The only evidence that even resembles legislative history appears in the *Extension of Remarks*, when Rep. Upton read in Section 6409(a) virtually verbatim after Congress enacted the statute. See 158 CONG. REC. at E239 (Feb. 17, 2012) (Statement of Rep. Upton).

In fact, Congress intended to create minimal substantive rules that facilitate *de minimis* changes to legally permitted wireless facilities that fall into a narrowly-defined class actually described by Congress within the body of Section 6409(a). Congress manifestly intended to require land-use approvals for less than “substantial[] change[s]” to “existing wireless towers and base stations.”⁵ The expansive definitions proposed in the Upton-Walden Letter go far beyond the plain and limited words of the statute. If the Commission accepted such an expansive set of definitions suggested by the Upton-Walden Letter, physically large and substantial changes to structures that were never envisioned or permitted as a “wireless tower or base station” could be imposed upon local communities. The Commission should reject such broad definitions.

Second, and contrary to the opinions expressed in the Upton-Walden Letter, the plain text of Section 6409(a) does not impose a “deemed granted” remedy or a ministerial review process. Section 6409(a) requires a particular result in particular circumstances, but does not impose any particular procedures or remedies.⁶

In sum, the Upton-Walden Letter proposes radically preemptive rules that lack support in the plain text of Section 6409(a). The Commission should afford the Upton-Walden Letter the same weight it would otherwise afford public comments, but the letter is not representative of Congressional intent.

Respectfully,

/s/ Patrick Whitnell

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⁵ See 47 U.S.C. § 1455(a) (2013).

⁶ See *id.*

ATTACHMENT “1”

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED THIRTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6115
Majority (207) 225-2927
Minority (207) 225-3641

May 29, 2014

The Honorable Tom Wheeler
Chairman
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Dear Chairman Wheeler:

With the spectrum provisions of the Middle Class Tax Relief and Job Creation Act of 2012 ("Spectrum Act"), Congress set the stage to bring valuable spectrum to market to meet wireless broadband demand, to provide first responders an interoperable nationwide wireless broadband network, and to generate needed revenue for the Treasury. In addition to making more spectrum available, there are other steps that must be taken to meet consumer demand for wireless services and build the nationwide public safety network -- namely, expanding existing networks and deploying next generation networks. Congress passed Section 6409(a) with the intent of streamlining the approval of eligible facilities requests and to avoid lengthy and costly disputes that thwart the efficient use of existing wireless infrastructure in expanding mobile broadband coverage and capacity.

In January of 2013, the Commission initiated a rulemaking proceeding to adopt rules to clarify and implement Section 6409(a). In commencing this action, the Commission expressly acknowledged the need of stakeholders for guidance as to how Section 6409(a) should be applied. Today, more than a year later, the need for that guidance remains.

Time is of the essence. We urge you to take swift action to clarify the terms of Section 6409(a) consistent with the intent of the statute to deliver the benefits of wireless broadband access to all Americans. To ensure that 6409(a) achieves its goal of streamlining the approval of eligible facilities requests, the Commission should adopt rules that provide consistency for applicants and reviewing authorities alike. The FCC should delineate an objective standard for when a modification "substantially change[s] the physical dimensions" of a wireless facility. We agree with the Commission's proposed approach of leveraging its existing rules, particularly the Collocation Programmatic Agreement, to craft this objective standard.


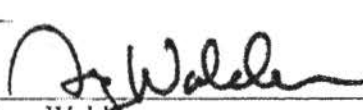
We also agree in principle with many of the Commission's tentative conclusions for the definitions of other key terms of 6409(a). "Wireless tower or base station" should, at a minimum, include structures that support or house an antenna, transceiver, or other associated equipment that constitutes part of a base station, even if they were not built for the sole or primary purpose of providing such support. "Base station" should include antennas, transceivers, and other associated equipment like fiber and coaxial cable, backhaul equipment, and regular and backup power facilities.

Further, 6409(a)'s "may not deny, and shall approve" mandate should establish a non-discretionary review process and a "deemed granted" remedy for eligible facilities requests, including those to structures deemed legal but non-conforming uses, so that these minor modifications and collocations can be submitted, processed and put into use as quickly as possible.

In addition to Section 6409(a), the Commission's other efforts in the rulemaking proceeding to identify ways to foster broadband infrastructure deployment warrant similar swift action. Facilitating both the deployment of small cells for targeted capacity and the use of temporary towers for short, sharp spikes in usage are part and parcel to meeting national broadband goals. Both are important tools for providing the robust service upon which consumers, businesses, and public safety rely.

If you have any questions, please contact David Redl with the Energy & Commerce Committee staff at (202) 225-2927.

Sincerely,


Fred Upton
Chairman
Greg Walden
Chairman
Subcommittee on Communications and
Technology

cc: The Honorable Henry A. Waxman, Ranking Member
House Committee on Energy and Commerce

The Honorable Anna Eshoo, Ranking Member
Subcommittee on Communications and Technology

The Honorable Mignon Clyburn, Commissioner
Federal Communications Commission

The Honorable Jessica Rosenworcel, Commissioner
Federal Communications Commission

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The Honorable Ajit Pai, Commissioner
Federal Communications Commission

The Honorable Michael O'Rielly, Commissioner
Federal Communications Commission